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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In re Applications of	)	MM Docket No. 99-153
	)	
READING BROADCASTING, INC.	)	File No. BRCT-940407KF
	)	
For Renewal of License of Station WTVE(TV), Channel 51 Reading, Pennsylvania	)	
	)	
and	)	
	)	
ADAMS COMMUNICATIONS CORPORATION	)	File No. BPCT-940630KG
	)	
For Construction Permit for a New Television Station On Channel 51, Reading, Pennsylvania	)	

To: Administrative Law Judge Richard L. Sippel

OPPOSITION TO REQUEST FOR LEAVE TO APPEAL

READING BROADCASTING, INC.

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February 16, 2000

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Summary

No basis exists for reconsidering or allowing an appeal of the Presiding Officer's *Memorandum Opinion and Order,* FCC 00M-007 (released January 20, 2000) (the *"MO&O"*). A compelling prima facie case has been made that Adams Communications Corporation ("Adams") filed its application for purposes other than to construct and operate a television station in Reading, Pennsylvania. Adams' application has all the indicia of being filed for purposes of replicating the outcome of the *Video 44* case, which Howard Gilbert of Adams described as "highly successful." In the *Video 44* case, Adams' principals received a substantial settlement payment, never had to construct or operate their proposed station, and were able to claim a public service victory. Adams itself acknowledges that it has no particular interest in the Reading television market, but filed its application in an attempt to establish a legal precedent against home shopping stations. This in itself constitutes an improper purpose for Adams' application. However, substantial evidence indicates that Adams' public service crusade is simply a charade and that achieving a settlement has been a potential goal from the outset. Accordingly, an inquiry is needed to determine whether Adams' application was filed and is being prosecuted for speculative or other improper purposes.

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To: Administrative Law Judge Richard L. Sippel

OPPOSITION TO REQUEST FOR LEAVE TO APPEAL

Reading Broadcasting, Inc. ("Reading"), by its counsel, hereby opposes the "Request for Leave to Appeal" ("Appeal") filed on February 7, 2000 by Adams Communications Corporation ("Adams"). Adams' Appeal seeks leave to appeal the Presiding Officer's *Memorandum Opinion and Order*, FCC 00M-07 (released January 20, 2000) (the *"MO&O"*). In support the following is shown:

A. The Appeal Fails to Meet The Standards For Appealing An Interlocutory Ruling.

Section 1.301(b) governs requests for leave to appeal interlocutory rulings. That rule requires a two-pronged showing: (a) that the appeal presents a new or

novel question of law or policy; and (b) that the ruling is such that error would likely require remand should the appeal be deferred and raised as an exception. Adams fails to meet either element of this standard, let alone both.[1] Adams also fails to request or justify a waiver of the rule.[2] The Appeal also fails to meet the procedural requirements of Section 1.49(c).

B. The *MO&O* Properly Framed The Issue.

A construction permit application is deemed to be a representation by the applicant that, if its application is granted, the applicant will construct and operate the proposed station.[3] Filing or prosecuting an application to achieve some other purpose is an abuse of process.[4] A compelling prima facie case has been made that Adams' application was filed for purposes other than constructing and operating a television station in Reading, Pennsylvania, i.e., that Adams had no bona fide intent to construct and operate the proposed station. Rather, the evidence shows that Adams' application has all the indicia of an attempt to replicate the experience of

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1 *See, e.g., Elinor Lewis Stephens,* 10 FCC Rcd 2863 (1995); *Welch Communications, Inc.,* 5 FCC Rcd 7066 (Rev. Bd. 1990) at ¶ 8 ("[T]he addition of hearing issues ... is not a matter subject to extraordinary appellate intervention").

2 *See, e.g., Mobilemedia Corp.,* 12 FCC Rcd 7927 (1997) at ¶ 12.

3 *Meredith Corp.,* 5 FCC Rcd 7015 (1990) at ¶ 13.

4 *See Formulation of Policies and Rules Relating to Broadcast Renewal Application,* 4 FCC Rcd 4780 (1989) at n.6:

> The term "abuse of process" can be generally defined as the use of a Commission process, procedure, or rule to achieve a result which that process, procedure, or rule was not designed or intended to achieve or, alternatively, use of such process, procedure or rule in a manner which subverts the underlying intended purpose of that process, procedure, or rule.

Adams' principals in the Chicago, Illinois license renewal proceeding involving *Video 44* and a challenger, Monroe Communications Group ("Monroe").[5]

1. Factual Background.

In the *Video 44* proceeding, Monroe (composed largely of Adams' principals) elected to accept a settlement exceeding $17 million rather than proceed with construction and operation of the television station they had been awarded through litigation against the incumbent licensee. *See* Reading Ex. 19 and Reading Ex. 22. Howard Gilbert, a principal of Adams and a principal of Monroe, testified that this outcome was "highly successful." Tr. 1116. Mr. Gilbert claimed that the *Video 44* case was a success not just because of the handsome settlement that Monroe received, but also because the decision in the case set a precedent against pay television operations and failure to serve the public interest by incumbent licensees. Tr. 1115-17. Mr. Gilbert's own testimony establishes that to Adams, a "highly successful" outcome does not need to involve constructing and operating a station as proposed.[6] Rather, Mr. Gilbert proclaimed that Adams' overriding interest is in establishing the principle that a home shopping format is inconsistent

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[5] *See Harriscope of Chicago, Inc.*, 102 FCC 2d 419 (A.L.J. 1985), *remanded in part and certified in part,* 102 FCC 2d 408 (Rev. Bd. 1985), *rev. granted,* 103 FCC 2d 1204 (1986), *recon. granted in part*, 3 FCC Rcd 757 (1988), *on remand*, 3 FCC Rcd 3587 (Rev. Bd. 1988), *rev. denied*, 4 FCC Rcd 1209 (1989), remanded sub nom, *Monroe Communications Corp. v. FCC,* 900 F.2d 351 (D.C. Cir. 1990), *application granted*, 5 FCC Rcd 6383 (1990), *recon. denied*, 6 FCC Rcd 4948 (1991) ("*Video 44*").

[6] Although Mr. Gilbert characterized the *Video 44* proceeding as a public service crusade on the part of Monroe, the settlement agreement between Monroe and the incumbent licensee did not impose public service obligations on the licensee. *See* Reading Ex. 19 and Tr. 1033-37. Rather, Mr. Gilbert's basis for claiming the case a success, apart from the settlement terms, was the precedential impact of the case.

with the public interest. Tr. 1120. Mr. Gilbert testified that buying a home shopping station and modifying the format did not interest Adams because it would not establish the precedent that Adams wanted. Tr. 1115, 1118-19.

The Adams venture was conceived either before or shortly after the *Video 44* case was finished. Tr. 1041, 1112-14. Mr. Gilbert and the others focused on home shopping stations as potential targets for competing applications because they were convinced that home shopping stations were not serving the public interest. Tr. 1040-41, 1112-14. Adams and its principals did not take part in the Commission's rulemaking proceeding on the issue of whether home shopping stations serve the public interest, but they were aware before they filed the Reading application that the Commission had held that home shopping stations serve the public interest. Tr. 1057-58, 1133. They nevertheless decided to proceed with a competing application against a home shopping station. Tr. 1122-23.

In the Chicago case, the principals of Monroe were personally familiar with the incumbent licensee's programming. Tr. 1002. In the present case, Adams' principals have never lived in the Reading area and never watched the incumbent licensee's programming. Mr. Gilbert testified that he and the other principals were indifferent as to whether they applied against a home shopping station in Reading or some other location, because any location would serve their purpose of attacking the public service record of a home shopping station as they had attacked the record of a pay television station previously. Tr. 1120, 1123-24, 1132.

Adams' efforts to ascertain the nature of WTVE's public service programming were minimal and largely unsuccessful. Mr. Gilbert visited Reading on

approximately three occasions (no overnight visits) before the application was filed. Tr. 1059-64. He never watched the existing station. Tr. 1061. Adams never reviewed the existing station's public inspection file before filing its application, even though Mr. Gilbert understood significance of a station's public file in this context. Mr. Gilbert did talk to some unnamed local residents who were not familiar with the station. Tr. 1011. Mr. Gilbert also hired some unnamed college students in Philadelphia to tape the station's programming for a period of approximately eighteen days, ending on June 30, 1994, the day that Adams filed its application. Tr. 1075-92. The college students briefed Mr. Gilbert on the programming being taped, and Mr. Gilbert watched some (Tr. 1068) or all (Tr. 1088) of the tapes himself. However, neither the college students nor Mr. Gilbert realized that the signal being taped was not the existing Reading station, but a cable home shopping signal. Tr. 1075-82. Moreover, it appears that the decision to proceed with the application had already been made while the taping was in progress, because Adams had taken steps to prepare the application. Tr. 1093.

Although Adams' application proposed a multi-million dollar budget, and although Adams' principals were aware that the existing licensee had recently been in bankruptcy, Adams' principals undertook no meaningful effort to analyze the financial viability of the proposed station. Tr. 1065-66, 1109-10. Adams' principals did not develop a business plan or formulate any meaningful management, staffing or programming plans. Tr. 1107-09. Mr. Gilbert claimed that economic factors were irrelevant because the group was embarked on a public service crusade. Tr. 1065.

Although Adams has disclaimed any interest or intention to participate in a settlement similar to the *Video 44* settlement, there is extrinsic evidence that Adams has contemplated a potential settlement from the outset. First, the principals decided to challenge home shopping stations almost immediately after (or perhaps during) the settlement in the "highly successful" *Video 44* proceeding. Tr. 1112-14. Second, Adams' retainer agreement with Bechtel & Cole, initially as an oral agreement and later in writing, provided for a bonus (double the firm's normal hourly rates) in the event of a grant or an "economically favorable" settlement (i.e., one that at least provided for reimbursement of expenses). Reading Ex. 21; Tr. 1020-21.[7] The structure of the retainer agreement clearly expresses an indifference as to either outcome. Third, Mr. Gilbert conceded that Adams had paid $3300 for its portion of an appraisal of the existing Reading station obtained by Telemundo. Tr. 1095-96. Although Mr. Gilbert claimed that he agreed to pay for the appraisal out of mere curiosity. Mr. Gilbert had previously claimed to have no interest in WTVE's economics. *See Motion to Dismiss Adams' Application,* Exhibit B at 14. Moreover, Mr. Gilbert conceded that Telemundo had approached him about the appraisal because Telemundo was interesting in effectuating "white knight"

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[7] Adams now attempts to characterize that retainer agreement as a 1999 agreement. However, the record shows that the 1999 retainer agreement memorialized an oral agreement reached many years ago and that Bechtel & Cole has billed Adams in accordance with that oral agreement from the time it was retained. Tr. 1020. Regardless of when the agreement was made, it is just as improper to prosecute an application for purposes of a settlement as it is to file an application for such purpose. *Meredith Corp., supra.*

settlement of the proceeding. Tr. 1095, 1105-06.[8]

2. The Commission Needs To Examine All of Adams' Motives.

Clearly, a prima facie case has been made that Adams' application was filed for a speculative or other improper purpose.[9] Contrary to Adams' suggestion, this may include the possibility of receiving a settlement payment, but that is not the only possible "speculative or other improper purpose." If one of Adams' goals was to establish an adverse precedent against home shopping stations' claim to a renewal expectancy, that is also a "speculative or other improper purpose." The Commission's rules contain provisions for seeking a declaratory ruling on matters applicable to a specific station or conducting a rulemaking on matters of policy applicable to a class of stations. 47 C.F.R. §§ 1.2, 1.399 et. seq. As noted above, the Commission did conduct a rulemaking on the issue of whether home shopping stations are entitled to a renewal expectancy. Adams could have participated in that rulemaking, but did not do so. The application process, on the other hand, is restricted to parties who intend to build and operate a broadcast station. *Meredith Corporation, supra.* The *MO&O* properly framed the issue to allow the Commission to evaluate all of Adams' motivations for filing the application.

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[8] The *MO&O* suggests that Reading was a party to the agreement with Telemundo to obtain an appraisal, but we do not believe that this was established by Mr. Gilbert's testimony.

[9] *See Reexamination of the Policy Statement on Comparative Broadcast Hearings,* 13 FCC Rcd 15920, 16006 (1998).

C. The *Garden State* Decision Provides Ample Support For Designating The Abuse of Process Issue.

Adams makes several attempts to distinguish *WWOR-TV, Inc.*, 7 FCC Rcd 636 (1992), *aff'd sub nom. Garden State Broadcasting L.P. v. FCC,* 996 F.2d 386 (D.C. Cir. 1993) (*"Garden State"*). Those attempts are meritless.

As an initial matter, the *MO&O* correctly stated that the standard for designating an issue is whether the totality of the circumstances raise a substantial question of fact. *MO&O* at ¶ 24. Accordingly, the relevant question is not whether the same circumstances exist here as in the *Garden State* case, but whether the totality of the circumstances present a prima facie case of the same type of improper motive as in the *Garden State* case. Clearly, just the extrinsic evidence as to Adams' interest in a potential settlement (*supra*) is enough to present such a prima facie case.

Adams attempts to distinguish *Garden State* by showing that there was a "short lapse of time" (approximately three weeks) in that case between the incumbent's commencement of programming and the challenger's decision to file a competing application, whereas Adams was not formed until November, 1993, approximately five months after the Adams principals received their final settlement payments in the Chicago case. Any such time difference is meaningless, because the Adams principals clearly did not forget receiving a $17 million settlement payment in the course of five months. Moreover, although Adams was incorporated in November 1993, Mr. Gilbert's testimony indicates that the plan to challenge home shopping stations may have been conceived even before the "highly successful" Chicago settlement was finalized. Tr. 1112-14.

A second purported distinction between this case and *Garden State* is that the challenger's credibility was deemed questionable in *Garden State*. However, Mr. Gilbert's testimony showed a number of variances and inconsistencies. *See, e.g.*, Reading Ex. 24 at ¶ 12 (Gilbert was briefed on the content of the tapes being made by the college students), Tr. 1068 (Gilbert watched some of the tapes), Tr. 1088 (Gilbert watched all of the tapes); Tr. 1045-46 (Gilbert concedes his deposition testimony about the number of applications Adams planned to file was false); Tr. 1106 (Gilbert failed to disclose appraisal discussions with Telemundo in his deposition because he did not view it as a settlement discussion, even though Telemundo indicated to him that they wanted to do the appraisal for purposes of a potential settlement); Tr. 1116 (*Video 44* case was highly successful), Tr. 1131 (Monroe would have made more money if it had not settled the case); Tr. 1107-09 (varying answers about staffing discussions); Tr. 1043 (varying answers about difficulty in finding a lawyer).

Even more fundamentally, Adams' credibility is clearly at issue with respect to Mr. Gilbert's claim that its application represents a public service crusade. If Adams' principals were so concerned about whether home shopping stations serve the public interest, why would they not even have submitted comments in the FCC rulemaking in which that issue was being decided? The answer is that Adams' "crusade" was simply a crusade to find a situation similar to the "highly successful" *Video 44* case. Even if establishing a legal precedent against home shopping programming were part of Adams' motivation, that is not a valid purpose for a competing application. The renewal process is intended to provide an avenue for

bona fide applicants to replace licensees that are not serving the public interest. *Video 44, supra,* 900 F.2d at 353. If the challenger does not carry out its proposal to build and operate the station, the challenge does nothing to advance that goal.[10]

A third attempted distinction between this case and *Garden State* involves the applicants' efforts to ascertain the existing licensee's public service record. In *Garden State,* the challenger had personal knowledge of the existing station's programming and also hired an independent consultant to prepare an analysis of that programming. *Garden State,* 7 FCC Rcd 636, at ¶¶ 11-13. In the present case, Adams has presented varying explanations of its review. In its November 22, 1999 Opposition at p. 11, Adams claimed that it took "extensive steps" to inform itself about WTVE's programming through its attempted taping of the station's signal. However, the taping produced no useful information because the college students that Adams used did not actually tape WTVE's signal. Accordingly, Adams is now claiming that the taping mishap is irrelevant, because Mr. Gilbert had concluded that a home shopping format did not serve the public interest and he confirmed that WTVE was a home shopping station. The problem with this "explanation" is that the Commission had already determined that home shopping stations serve the public interest by carrying various types of public service programming. Mr. Gilbert never determined whether WTVE was airing such public service

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[10] Adams' claim that a business plan, programming plans and staffing plans were premature, given the duration of a renewal proceeding, misses the point. If Adams were serious about constructing and operating a UHF station in Reading, Pennsylvania, it would have undertaken meaningful due diligence into the viability of such a station. This is particularly the case when the existing licensee had recently been in bankruptcy, as Adams was aware.

programming in addition to its home shopping programming. (For instance, even though he had been through a renewal proceeding before, Mr. Gilbert did not review or hire anyone to review WTVE's public file before filing the application.) The *MO&O* is correct in concluding that the accuracy, completeness, seriousness and utility of Adams' review of WTVE's programming are open to question.

D. Conclusion.

The *MO&O* should not be reconsidered or appealed to the Commission. Adams' Appeal fails to meet the standards under Section 1.301(b) for appealing an interlocutory order. Reading has established a strong prima facie case that Adams' application is not a bona fide application. Adams' proclaimed motivation is to establish a legal precedent against the home shopping format. Clearly, that does not constitute a valid basis for filing the application in Reading. However, substantial evidence also indicates that this proclaimed motivation is highly dubious and that the potential for a settlement is a motivating factor for Adams. If nothing else, Mr. Gilbert's testimony that the *Video 44* case was "highly successful" is particularly revealing. In the *Video 44* case, Mr. Gilbert's group received a substantial payment, did not have to build or operate the proposed station, and was

able to claim a public service victory. Adams' application has all the indicia of an effort to replicate that success.

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February 16, 2000

CERTIFICATE OF SERVICE

I, Myra F. Powe, a secretary in the law firm of Holland & Knight LLP, do hereby certify that on February 16, 2000, I caused a copy of the foregoing Opposition to Request for Leave to Appeal to be delivered by facsimile as follows:

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